87-54

NO.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

WINSTON ROY MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Murray J. Janus
Larry A. Pochucha
Suite 1500 - 7th & Franklin Building
Richmond, Virginia 23207
(804) 644-0721

QUESTIONS PRESENTED

1. Can one act of appellant constitute a "series" under 21 U.S.C. § 848?

2. What quantum of proof is required for a showing of the receipt of substantial profits or resources under 21 U.S.C. § 848?

3. May a conspiracy conviction pursuant to 21 U.S.C. § 846 or 21 U.S.C. § 963 constitute one of the series required to support a conviction under 21 U.S.C. § 848?

4. Did the trial court err by its refusal to instruct the jury on multiple versus single conspiracies?

5. Did the trial court err by its refusal to instruct the jury on venue?

6. Did the trial court err by its failure to exclude the testimony of Harry H. Stiles pursuant to Rule 403 of the Federal Rules of Evidence?

SUBJECT INDEX

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-

WINSTON ROY MARTIN, a/k/a Marcus,

Petitioner,

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Winston Roy Martin, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned case on March 25, 1987.

OPINIONS BELOW

The opinions of the courts below directly preceding this petition are as follows:

1. Order, dated May 5, 1987, denying petition for rehearing, United States of America v. Winston Roy Martin, etc., unreported, No. 86-5604 (4th Cir. 1987) (copy attached hereto);

2. Opinion and Order dated March 25, 1987, United States of America v. Winston Roy Martin, a/k/a Marcus, unreported, No. 86-5604 (4th Cir. 1987) (copies attached hereto); and

3. Judgment and Commitment Order returned upon jury verdict of guilty, dated June 25, 1986, United States of America v. Winston Roy Martin, a/k/a Marcus, Cr. 85-00108-02-R (U.S.D.C. E.D. Va. 1986).

JURISDICTION

Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. § 1254 (1), from the judgment rendered by the Court of Appeals on March 25, 1987 and that Court's denial on May 5, 1987 of a Petition for Rehearing.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if-

(1) he violates any provision of this subchapter or subchapter II of

this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter-

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

21 U.S.C. § 963

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

FED. R. EVID. 403

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

On December 16, 1985 the Grand Jury of the United States District Court for the Eastern District of Virginia, Richmond Division returned a ten count indictment against Winston Roy Martin charging conspiracies to import marijuana into the United States and to possess with intent to distribute marijuana; four counts of actual importation of marijuana into the United States and four counts of actual possession with intent to

distribute marijuana. On March 17, 1986, the Grand Jury returned a superceding indictment including all counts charged in the original indictment and the additional count of engaging in a continuing criminal enterprise. The government commenced and concluded its presentation of evidence on May 20, 1986.

At the conclusion of all of the evidence appellant, by counsel, renewed his earlier motions for judgments of acquittal on counts 3, 8 and 9 and the court denied same. After closing argument, counsel presented jury instructions to the Court. Appellant tendered an instruction pertaining to multiple versus single conspiracies and venue; the Court refused the the instructions. The Court then instructed the jury and the jury retired. The jury returned verdicts of guilty on counts 1, 2, 3, 6, 7, 8, 9, 10 and 11. The jury also, upon instruction, deliberated upon a forfeiture of property pursuant to the guilty finding in the continuing criminal enterprise charge, and returned with a verdict of no forfeiture of property.

Sentencing was scheduled for June 25, 1986 along with argument on any motions filed by appellant. Appellant filed a Motion for Judgment of Acquittal on all counts. The Motion was argued and denied on June 25, 1986 and the appellant was sentenced to five years on count 1, to run concurrent with the sentence on count 3; five years on count 2 to run concurrent with the sentence on count 3; ten years on count 3 and imposition of sentence was suspended on the remaining counts. On July 1, 1986, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit.

On March 25, 1987, the Court of Appeals vacated the parts of the judgment convicting appellant on counts 8 and 9 of the indictment, vacated the sentence imposed on count 2 and affirmed the judgment in all other respects. A Petition for Rehearing was filed on April 8, 1987 and denied on May 5, 1987.

The United States alleged that Winston Roy Martin a/k/a Marcus, hereinafter referred to as "Martin", was a key member in a scheme to import and distribute

marijuana into the United States from Jamaica during the period from April of 1982 through March of 1985. It was further alleged that William R. Berger and Vincent Willis controlled the transportation, receipt and distribution of the marijuana from Jamaica and into Virginia. The United States alleged that Martin, along with one Astill H. Jadusingh, Jr. were suppliers of the marijuana in Jamaica. The substantive offenses involved four separate shipments of marijuana from Jamaica to the United States occuring in: (1) April and May of 1982 (counts 4 and 5); (2) August of 1982 (counts 6 and 7); (3) July of 1983 (counts 8 and 9) and (4) December of 1983 (counts 10 and 11). Martin was found not guilty of counts 4 and 5 by the jury and the judgments of guilt on counts 8 and 9 were vacated by the Court of Appeals.

Florizell Foy, an employee of William Berger, testified that Berger advised him that through a series of events in April or May of 1982 Berger had met Martin in Jamaica and there Martin, with the assistance of Jamaican police, had provided him with 2,000 pounds of marijuana for shipment to the United States. Martin

was acquitted by the jury on counts 4 and 5 which were based upon those allegations. Foy further stated that Berger had met Astill H. Jadusingh through a chance meeting on an airplane in the summer of 1982 and that Berger was told by Jadusingh that he was the major Jamaican supplier of marijuana with whom Berger should deal exclusively. Foy described the relationship between Jadusingh and Martin as distant, stating that Berger's connections with Jadusingh and Martin were separate and that Berger received greater quantities of marijuana from Jadusingh than from Martin.

Neither Foy nor any other government witness testified that they had ever taken any orders from Martin nor paid him any money.

James Robert Smith and Steven Wickman each made two trips to Jamaica in 1982 and 1983 during which Martin allegedly assisted in supplying marijuana. Wickman was involved in a third shipment in 1984; however, he related that the marijuana came exclusively from Jadusingh on that occasion.

In August of 1982 Wickman and Smith piloted a boat to Jamaica and while docked, under cover of night, the boat was loaded with marijuana. On the following day as the boat was to depart Jamaican customs officicals removed Wickman from the boat; Martin arrived on the scene and after reaching in his pocket, Wickman and Smith were released.

In December of 1983 Wickman and Smith participated in the loading of marijuana onto a sailboat owned by Wickman. Both testified that Martin was present along with Jadusingh and other suppliers of marijuana. There were numerous individuals on the beach and neither Wickman nor Smith was able to determine the employer or supervisor of those persons. They were each definite in their recollection that there were two to three separate suppliers of the substance. In each instance the marijuana was transported to the United States, unloaded in a location other than the Eastern District of Virginia and shipped by land to the said District.

During the summer of 1983 Gerald James Otey, Jr. and Clarence Warner Elbourn took part in meetings to plan a Jamaican marijuana shipment to Virginia, sailed to Jamaica and loaded marijuana on a boat. During the return trip the boat developed mechanical problems in Cuban waters and was seized by Cuban authorities. No Jamaican took part in the planning meetings and Elbourn could not identify Martin as an individual he had seen in Jamaica.

Hilton "Chip" Brooks testified that he joined the Berger-Willis operation in the spring of 1982. He travelled to Charleston, South Carolina in August of 1982 and to Florida in July of 1983 for the purposes of assisting in the transport of marijuana from those locations to Virginia. Brooks had seen Martin at a party at his house in August of 1983, but did not know why Martin was in Virginia at that time. Brooks also acted as a Virginia distributor for Berger and paid approximately $900.00 per pound for sensimilla grade marijuana and $350.00 per pound for commercial grade.

Harry Stiles, a criminal investigator for the Brazoria County Sheriff's Department in Texas testified for the government regarding contemporaneous bad acts and admissions against interest. Martin objected to such testimony and the trial court ruled that the evidence could not be admitted to show contemporaneous bad acts, but would be admitted for the purpose of showing the extent of Martin's capability for participating in the conspiracy. (Ap. 120-121).

Stiles met Martin in Brazoria County, Texas in October of 1982. (Ap. 121). While working as an undercover agent, he allegedly negotiated with Martin to purchase 20 tons of marijuana. (Ap. 122). Martin was said to have advised Stiles that he personally owned 15 acres of sinsemilla marijuana; that he could furnish commercial marijuana, sinsemilla marijuana and hashish oil; that the Jamaican officials worked for him and that he could handle at least 20 tons of marijuana. (Ap. 123-124).

At a meeting in August of 1983 Martin allegedly agreed to supply 15,000 pounds of marijuana for $90 per pound. (Ap. 125). Jamaican customs officials were to

be paid $20,000 for protection; Martin was to receive $100,000 to $200,000 in cash and the balance of approximately $1,150,000 in a letter of credit issued to Martin's bank. Stiles and Martin never consumated a transaction. (Ap. 126-127). Stiles had not discussed Berger, Willis, Jadusingh, Elbourn, Wickman or Smith with Martin nor was evidence presented that Stiles had any independent knowledge of or contact with participants in the Berger-Willis operation. (Ap. 130).

Edward S. Bishop, Jr., special agent with the Criminal Investigation Division of the Internal Revenue Service testified and used Martin's passport in an attempt to correllate Martin's departures from Jamaica with incidents which occured shortly after the times of the departures. Bishop further related Martin's account of his assets as stated at his bond hearing.

REASONS FOR GRANTING WRIT

I. Circuit Court opinions conflict regarding the inclusion of conspiracy convictions under 21 U.S.C. § 846 or 21 U.S.C. § 963 as one of the required series of

three violations of the federal narcotics laws necessary to support a conviction under 21 U.S.C. § 848.

II. Questions concerning the quantum of proof required to support a conviction for a violation of 21 U.S.C. § 848 and the necessary elements thereof have not been interpreted in a uniform fashion by the various Circuit Courts of Appeals or decided upon by this Court.

III. The trial court refused to provide jury instructions on the issues of single and multiple conspiracies and venue, where the evidence presented factual questions on such issues and the sanction of that omission by the Fourth Circuit Court of Appeals is in conflict with the practice in other Circuits of the Courts of Appeals and violated Appellant's right to due process of law, thus requiring this Court to exercise its power of supervision.

IV. The trial court's admission of highly prejudicial testimony of alleged acts of Appellant unrelated to the factual situation in the case at bar, although admitted for a strictly limited purpose, was used in argument by the government and relied upon by the Court of Appeals to support an element of the offense charged and thus

violated Appellant's right to due process of law and requires this Court to exercise its power of supervision.

ARGUMENT

I. THE APPELLANT WAS DENIED DUE PROCESS OF LAW BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF A VIOLATION OF 21 U.S.C. § 848.

In order to sustain a finding of guilt of a violation of 21 U.S.C. § 848 the government is required to prove (1) a felony violation of the federal narcotics laws; (2) as part of a continuing series of violations; (3) in concert with five or more persons; (4) for whom the accused is an organizer, supervisor or manager and (5) from which the accused derives substantial income or resources. United States v. Lurz, 666 F. 2d 69, 75 (4th Cir. 1981), cert. denied, 459 U.S. 843 (1982). The "continuing series of violations element" requires a showing of three such violations. Garrett v. United States, 105 S.Ct. 2407 (1985); United States v. Ricks, 776 F. 2d 455, 463 (4th Cir. 1985), 802 F.2d 731 (1985) (en banc), cert. denied,

107 S. Ct. 650 (1986). The government failed to prove (1) the series element; (2) Martin's supervisory, managerial or organizational status and (3) the receipt of substantial income or resources. The government's failure to prove these elements beyond a reasonable doubt is clear, requiring reversal of the conviction. Burks v. United States, 437 U.S. 1, 17 (1978).

The government failed to prove that Martin occupied a supervisory, managerial or organizational position with respect to five or more individuals. Admittedly, the five or more persons need not all act at the same time. United States v. Phillips, 664 F. 2d 971, 1013 (5th Cir. 1981), cert. denied 457 U.S. 1136 (1982). However, the accused must occupy the position of manager, supervisor or organizer with respect to five persons within the ordinary meaning of those terms. United States v. Ray, 731 F. 2d 1361, 1367 (9th Cir. 1984). Foy testified that he was employed by William Berger (Ap. 24) and that he had never taken any orders from Martin. (Ap. 42). Vincent Willis hired Smith and Wickman and neither had ever taken orders from Martin. (Ap. 88). Hilton

Brooks testified that Willis and Berger had differing degrees of decision making authority within their organization, and that he knew of no one in the organization who had taken orders from Martin. (Ap. 112). The terms manager and supervisor each connote the ability to direct the actions of subordinates while the term organizer does not necessarily carry such a connotation; however, no evidence indicates Martin as an "organizer". The government contends that Martin's alleged involvement in a marijuana shipment occurring in April or May of 1982 involving the Jamaicans Devon, Danny and numerous Jamaican authorities showed Martin's capacity as supervisor, organizer or manager, but verdicts of acquittal on the counts 4 and 5 of the indictment show such reliance to be misplaced. Further, the government contends that persons involved in the loading of marijuana in December of 1983 from the property of Astill Jadusingh were under Martin's authority; however, Smith stated that he was unable to determine who was employed by whom, (Ap. 59) and Wickman was uncertain as to who was responsible for supplying the

marijuana which was loaded. (Ap. 85). Count 3 is further undermined by the fact that the government did not prove that Martin received substantial income or resources as a result of his alleged involvement in the enterprise. Evidence presented by the government pertaining to Martin's assets indicated that they were acquired prior to the date on which the drug smuggling conspiracy was to have begun. (Ap. 150). No proffer of a high style of living with expensive automobiles and shell corporations was made. United States v. Barnes, 604 F. 2d 156 (2nd Cir. 1979). The government's case rests on the theory that from the quantities of cash and marijuana received by others, an inference necessarily arises that Martin received substantial profits. The case at bar is distinguishable from United States v. Webster, 639 F. 2d 174 (4th Cir. 1981), cert. denied 456 U.S. 935 (1982) for in that case a large quantity of drugs was shown to have "been moving in and out of Webster's possession." Here, Martin is alleged to have been a source supplier of marijuana, a grower in Jamaica. (Ap. 32). As a grower, it would be unnecessary for Martin to have

any money to acquire marijuana. The government then contends that as a supplier, he was paid large sums for the quantity supplied:

> An inference is a deduction, warranted by human experience, which the trier of fact may make on the basis of established facts—a process of reasoning from a premise to a conclusion without the directive force of a rule of law, which characterizes a presumption.
> LOUISELL AND MUELLER, FEDERAL EVIDENCE 536 (1977).

A valid inference must be based upon established facts. The testimony regarding Martin's status as a supplier of marijuana was that he was one of two or three suppliers. (Ap. 75). On one occasion Wickman transported a shipment of marijuana which was supplied exclusively by Jadusingh apart from any involvement of Martin. (Ap. 89). In view of this evidence, the jury had to speculate as to the quantity of marijuana Martin allegedly supplied on any given occasion. An inference based upon speculation must surely be a fact which a reasonable person would doubt. There was no evidence of any payment in cash or otherwise actually having

been made to Martin. (Ap. 44). Notwithstanding the paucity of evidence regarding quantities of marijuana linked to Martin, the government relies upon the testimony of Harry Stiles to buttress its case for a showing of substantial profits earned. An objection was made to Stiles' testimony and sustained to the extent that such testimony was excluded for the purpose of proving any of the charges being tried. The testimony was admitted only as proof of Martin's "capability for participating" in crimes. (Ap. 120, 121). Since the evidence was admitted for that limited purpose, it offends fundamental fairness to allow such evidence to serve here as proof of an element of the crime charged. Hilton Brooks, testimony concerned sums paid for marijuana subsequent to its importation into the United States and profits which distributors in the United States could expect to receive at different levels of the distribution chain. (Ap. 103). Such evidence is insufficient to prove amounts paid to suppliers at the source. Thus, when the evidence is considered as a whole there is (1) a complete absence of evidence regarding any money actually paid to Martin;

(2) a complete lack of evidence regarding the quantity of marijuana provided by Martin individually and (3) no evidence of assets acquired by Martin through illegal profits. In other cases where inferences of profits or resources have arisen, some direct proof existed of a quantity of illegal substance, money or valuable property in the possession of the defendant. In the case at bar there is no such evidence.

Martin submits that the offenses of which he has been acquitted may not serve as the predicate offenses for the series element of the crime. Garrett v. United States, 105 S.Ct. 2407, 2422 (1985) (O'Connor, J., concurring); United States v. Boldin, 772 F. 2d 719 (11th Cir. 1985). As each element of a crime must be proven beyond a reasonable doubt, the acquittals are a sufficient revelation that the underlying facts were not proven beyond reasonable doubts. United States v. Jefferson, 714 F. 2d 689 (7th Cir. 1983).

Consideration must next be given to whether Martin, in fact, committed a "continuing series" of violations falling within the purview of 21 U.S.C. § 848. In

making this consideration reference must be made to the plain language of the statute. United States v. Collier, 358 F. Supp. 1351 (E. D. Mich. 1973) interpreted "continuing" and "series" as follows:

> Webster's New World Dictionary (2nd ed. 1972) defines continuing as "to remain in existence or in effect; last; endure." . . . The court defined continuing offense as a "continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." . . . Black's Law Dictionary (4th ed. 1951) "continuing, enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences."
>
> The term "series" is defined often as meaning three or more related events . . . "series of acts" means three or more "things or events standing or succeeding in order and having like relationships to each other."

United States v. Bergdoll, 412 F. Sup. 1308 (D. Del., 1976) states that "continuing" merely requires that the course of illicit conduct stand a definite period of time, and the "series" element is established by proof of three or more related violations. In accordance with these definitions and the common meaning of the term

"series" Martin submits that counts 6 and 7 may constitute but one in a series and, likewise, counts 10 and 11 must be considered together as one additional offense in the series.

Count 6 of the indictment charged importation by Martin and Jadusingh during August, 1982; Count 7 charged possession with intent in August, 1982.

In its argument in brief and at the trial the government, to obtain a conviction of possession with intent to distribute, relied on Title 18, United States Code, Section 2, aiding and abetting, to prove Martin's guilt of that offense. The government relied entirely upon the facts of Martin's involvement in the importation scheme to obtain a conviction of the possession charge by stating that the possession could not have taken place without the importation and therefore if the importation was proved the possession with intention to distribute necessarily followed. As stated, the term "series" means that one event ends and another occurs immediately thereafter. Although a single act may be a violation of more than one statute, as indeed it was in

this case, it tortures the English language and frustrates the legislative intent of Congress to conclude that because the single act violates multiple statutes, that act must necessarily be not a single act, but a "series" of acts. In order to constitute a series there must be a temporal separation between the constituent parts of the series. As stated in the definition above the things or events must stand or succeed in order. Where a single course of conduct by a defendant to effect the importation of a substance simultaneously aids and abets the possession with intent to distribute the substance the events neither stand in order nor succeed one another.

Count 11 of the indictment is identical to Count 10 except for the substitution of the possession charge for the importation charge. As with count 7, the government relied entirely upon the facts of Martin's involvement in the importation (count 10) to obtain a conviction of the possession count under the theory that the importation was a necessary prerequisite of the possession with intent to distribute which was thereby

aided. Accordingly, Martin's position that counts 6 and 7 are one of a series applies equally to counts 10 and 11.

If counts 6, 7, 10 and 11 constitute two predicate offenses of a required series of three the propriety of allowing the conspiracy convictions under either 21 U.S.C. §846 or 21 U.S.C. §963 to serve as the third predicate felony conviction is determinative of the proof of the series element. It is submitted that the temporal relationship between 21 U.S.C. §846 and 21 U.S.C. §963 mirrors the relationship between counts 6 and 7 and 10 and 11 and therefore the said conspiracy convictions are a single act in the scheme of the series analysis.

The question of the use of a conspiracy conviction as a predicate felony to satisfying the series element of 21 U.S.C. §848 is a subject of conflict among the circuits. United States v. Young, 745 F. 2d 733 (2nd Cir. 1984), cert. denied 470 U.S. 1084 (1985) reasoned that because there is no express prohibition in the language of the statute, Congressional intent is to allow the conspiracy to serve as a predicate felony. United States v. Ricks, 802 F. 2d 731 (4th Cir. 1986) reversing earlier

dicta in the circuit held that the court was persuaded by rulings in sister circuits that the government could rely on a conspiracy violation to complete the §848 offense. United States v. Jefferson, 714 F. 2d 689 (7th Cir. 1983) prohibits the use of a conspiracy conviction as one of the predicate offenses.

The use of a conspiracy conviction to satisfy the series element clearly violates the legislative intent of 21 U.S.C. §848. The statute provides that a conviction may be had only upon a showing of separate and distinct continuing violations of the federal narcotics statutes. Both the continuous element as well as the series element are disregarded when a single act may satisfy all of the elements of the statute.

If the conspiracy charged is a lesser included offense of continuing criminal enterprise as stated in Jeffers v. United States, 97 S.Ct. 2207 (1977) and an instruction providing that the lesser charge must be dismissed upon a finding of guilt of the greater charge could be required, then it offends fundamental fairness

to allow the lesser charge to serve as an additional element of the greater offense.

II. THE COURT ERRED BY DECIDING VENUE AS A MATTER OF LAW AND REFUSING TO INSTRUCT THE JURY ON THE ISSUE OF VENUE.

> Venue is an element of any offense; the prosecution always bears the burden of proving that the trial is in the same district as the crimes commission. Whether venue has been properly proved is a jury question.
> United States v. Winship, 724 F. 2d 1116 (5th Cir. 1984);
> Green v. United States, 309 F. 2d 852 (5th Cir. 1962).

Martin recognizes that in certain instances it has been held that where proof of venue is clear, failure to instruct the jury on the issue may not be reversible error. United States v. Moeckly, 769 F. 2d 453 (5th Cir. 1983). This, however, is not such an instance. The major portions of testimony concerning the alleged acts of Martin herein deal with acts of Martin which took place in Jamaica. In regard to all of the substantive counts of the indictment, the marijuana was shown to have first entered the United States at locations other

than the Eastern District of Virginia. While the jury could have found that Martin had formed the requisite intent that the marijuana's final destination would be Virginia, the jury could also have found from the evidence that Martin did not form such an intent, that is, that his intent related only to the arrival of marijuana in Florida or in South Carolina. In such instances then, the venue would only be proper in those jurisdictions. Accordingly, it was error for the trial court to refuse Martin's request to instruct the jury on the issue of venue.

III. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF SINGLE AND MULTIPLE CONSPIRACIES.

The indictment involved a conspiracy which was alleged to have a duration from 1982 to 1985; however, no act of Martin was alleged to have occurred subsequent to December of 1983. Florizel Foy (Ap. 38) and Steven Wickman (Ap. 94) testified that Astill Jadusingh

had separate and distinct dealings with Berger and Willis. No evidence indicated that Martin had had any involvement with the conspiracy prior to the arrival of Berger and Willis in Jamaica in April or May of 1982 contrary to allegations in paragraphs B and C (see appendix) of the indictment. Paragraph D of the indictment related an initial involvement of Martin which was charged in counts 4 and 5 of which Martin was acquitted by the jury.

Paragraphs I through R of the indictment alleged involvements of Martin in the conspiracy which were not proven at the trial. Paragraphs O, P and Q related to crimes charged in counts 8 and 9 of which Martin was acquitted on appeal. Government witnesses testified that Martin had no involvement in the incidents alleged to have occurred in paragraphs W and X of the indictment. These variances between the indictment and proof offered at trial prejudiced Martin by allowing the jury to improperly impute actions of Jadusingh to Martin when, in fact, the evidence indicated that they acted separately rather than in concert. Kotteakos v. United

States, 328 U.S. 750, 767-69, 66 S.Ct. 1239, 1249-50, 90 L. Ed. 1557 (1946). This problem with a determination of the jury's view of the evidence could and should have been resolved by the submission to the jury of an instruction requiring a finding of a single conspiracy or acquittal of the conspiracy counts. United States v. Orozco-Prada, 732 F. 2nd 1076 (2d Cir. 1984); United States v. Borchardt, 698 F. 2d 697 (5th Cir. 1983); United States v. Borelli, 336 F. 2d 376 (2d Cir. 1964).

IV. THE TRIAL COURT ERRED BY ADMITTING THE HIGHLY PREJUDICIAL TESTIMONY OF HARRY H. STILES, JR.

Over objection of Martin, the trial court permitted Harry H. Stiles, Jr., an investigator with the Brazoria County, Texas Sheriff's Department, to testify concerning negotiations for the sale of marijuana in Texas entirely unrelated to the charges being tried. (Ap. 121-124). Such evidence should have been excluded pursuant to Rule 403 of the Federal Rules of Evidence. While the trial court allowed the evidence for the limited purpose of showing Martin's "capability for

participating" (Ap. 122), the prejudicial effect of such testimony far outweighed any probative value. The quantities of marijuana discussed, the facilities and sums of money alleged to have been involved all greatly exceeded anything Martin was alleged to have done in the charges being tried. This aspect, together with the fact that none of the matters testified to by Stiles had been verified nor had any transfer of marijuana taken place directed the exclusion of evidence. Such facts served only to incite the passions and prejudices of the jury and was not essential to the presentation of the government's case.

As defined by Wigmore, undue prejudice occurs where the evidence would:

> (1) be likely to stimulate an excessive emotion or awaken a fixed prejudice as to particular subject or person involved in the issues and
> (2) thus dominate the mind of the tribunal and prevent a rational determination of the truth and
> (3) where the evidence having this tendency is not necessary to the ascertainment of the truth.
>
> 22 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CIVIL, SECTION 5215 (1982)

The admission herein of the testimony offered unfairly prejudiced Martin's case. United States v. Perry, 765 F. 2d 1199 (4th Cir. 1985).

CONCLUSION

For the foregoing reasons, Winston Roy Martin respectfully submits that the Petition for Certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted

Murray J. Janus
Larry A. Pochucha
BREMNER, BABER & JANUS
Suite 1500,
7th & Franklin Building
Richmond, Virginia 23207

Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-5604

United States Of America,

Appellee,

versus

Winston Roy Martin, etc.,

Appellant.

On Petition for Rehearing

ORDER

Upon consideration of the appellant's petition for rehearing,

RDERED that the petition for rehearing

d at the direction of Judge Butzner for a

ng of Judge Hall, Judge Haynsworth and

For the Court,

_____

CLERK

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-5604

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

WINSTON ROY MARTIN, a/k/a Marcus,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, District Judge. (CR-85-108-R)

Argued: January 5, 1987

Decided: March 25, 1987

Before HALL, Circuit Judge, and HAYNSWORTH and BUTZNER, Senior Circuit Judges

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Larry A. Pochucha (Smith & Pochucha on brief) for appellant; William G. Otis, Assistant United States Attorney (Henry E. Hudson, United States Attorney; Gregory Welsh, Assistant United States Attorney; Todd Holliday, Student Assistant to the United States Attorney on brief) for appellee.

BUTZNER, Senior Circuit Judge:

Winston Roy Martin appeals his convictions of serveral offenses relating to the importation and possession for distribution of marijuana over a several-year period. Martin was charged in an 11-count indictment with conspiracy to import marijuana, in violation of 21 U.S.C. § 963; conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846; engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848; four counts of importing marijuana in violation of 21 U.S.C. §§ 952 and 960; four counts of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841, and aiding and abetting in the importation and distribution.

A jury found Martin guilty in nine of the eleven counts. It acquitted him of charges of importing and possessing marijuana with regard to a shipment that took place in May 1982.

Martin makes numerous allegations of error. First, he challenges the legal sufficiency of the evidence to uphold his convictions on several of the counts. We agree with Martin that the evidence was insufficient as to counts 8 and 9 on which the court had suspended the imposition of sentence. Count 8 of the indictment charged Martin with importation of approximately 1200 pounds of marijuana into the eastern district of Virginia through the southern district of Florida from a foreign country during July 1983. Count 9 charged him with possession with intent to distribute the marijuana in Gum Tree, Virginia.

The only evidence about Martin during the time period relating to the July 1983 shipment was the following: computer records introduced by a United States Customs agent showing that Martin had entered the United States at Miami, Florida, on June 28, 1983, and on July 12, 1983; testimony by an Internal Revenue special agent that Martin's passport

indicated that he had landed in Jamaica on August 9, 1983; and testimony by a participant in the July 1983 shipment that Martin attended a party in Gum Tree, Virginia, on August 7, 1983, and that Martin's reason for being in Virginia was "normally to collect money."

No evidence directly linked Martin in any way to the July shipment. His entrance into the country establishes no relationship to the importation of the marijuana. Nor can he be convicted of aiding and abetting. None of the evidence showed that Martin "knowingly associated himself with and participated in the criminal venture." United States v. Winstead, 708 F.2d 925, 927 (4th Cir. 1983). Mere association with the other alleged participants is not sufficient. Because there was not substantial evidence, taking the view most favorable to the government, to support the verdicts, Martin's convictions in counts 8 and 9 must be reversed. See Glasser v. United States, 315 U.S. 60, 80 (1942).

Martin challenges his conviction of engaging in a continuing criminal enterprise on several grounds. He first contends that the court erred in its charge to the jury concerning the first element of the offense, the § 848(b)(1) predicate felony violation of the federal narcotics laws.

In order to convict a defendant of engaging in a continuing criminal enterprise under 21 U.S.C. § 848, the government must prove that he 1) committed a felony violation of the federal narcotics laws; 2) as part of a continuing series of violations; 3) in concert with five or more persons; 4) for whom the defendant is an organizer or supervisor; and 5) that the defendant derived substantial income or resources from the enterprise. United States v. Lurz, 666 F.2d 69, 75 (4th Cir. 1981). The court charged the jury that in order to find the predicate felony required by § 848(b)(1), it must "find the defendant guilty of one of the other charges in Counts One, Two, or Four through Eleven of the indictment." Martin argues

that the court erred in including count 2, the conspiracy charge under 21 U. S. C. § 846.

Martin did not object to this charge, and therefore he is not entitled to raise it on appeal. Fed. R. Crim. P. 30; United States v. Bryant, 612 F.2d 799, 803 (4th Cir. 1979). In any event, the instruction was correct. See United States v. Ricks, 802 F.2d 731, 737 (4th Cir. 1986) (en banc). In addition, any one of the four remaining substantive counts (counts 6, 7, 10 and 11) was sufficient to satisfy the § 848(b)(1) predicate offense requirement. United States v. Sterling, 742, F.2d 521, 526-27 (9th Cir. 1984).

Martin's argument that the government did not show the required series of violations under § 848(b)(2) must fail for the same reason. The same substantive convictions could properly be considered by the jury in determining whether the series element had been met. See Sterling, 742 F.2d at 526.

Martin next contends that the government failed to prove that he acted in a managerial capacity over five or more individuals. In a related argument, he contends that the court's instruction to the jury concerning this element improperly usurped the jury's function of applying the ordinary meaning to the terms.

Section 848 requires the government to show that Martin organized or supervised or managed at least five other individuals. It does not have to prove he was the single ringleader. United States v. Phillips, 664 F.2d 971, 1034 (5th Cir. 1981). Martin need not have had personal contact with each nor the same relationship with each person. United States v. Dickey, 736 F.2d 571, 587 (10th Cir. 1984). Viewing the evidence in its entirety, there was sufficient evidence for the jury to conclude Martin played such a role. The evidence showed that Martin bribed Jamaican officials to allow boats loaded with marijuana to leave the harbor. Martin paid Jamaican

farmers to grow the marijuana. He was present when laborers loaded the marijuana he supplied onto the boats, and the jury could reasonably infer that he supervised their work.

There was no error in the charge. The court correctly instructed the jury that it should "give the words 'organizer, supervisor, or manager' their everyday, ordinary meaning." The court further stated:

> In considering whether the defendant occupied an organizational, supervisory, or managerial relationship with respect to the five or more persons, you should consider evidence that might distinguish the defendant's position from that of an underling in the enterprise. Did the defendant negotiate large-scale purchases or sales of the narcotics? Did he make arrangements for transportation or money washing? Did he instruct the participants in the transactions? These inquiries are not conclusive. They are simply the kind of questions you should ask yourselves in thinking about the defendant's

> role in these activities and his relationship with other persons involved in them.

The court also instructed the jury that it must decide unanimously which five or more individuals Martin organized or managed. Martin's contention that the example "Did the defendant negotiate large-scale purchases or sales of narcotics?" was tantamount to a directed finding on the element is unfounded.

Martin's final contention concerning the continuing criminal enterprise conviction is that the government failed to prove that he received substantial income or resources from the enterprise. This argument also must fail.

Circumstantial evidence may suffice to prove receipt of substantial income. Phillips, 664 F.2d at 1035. A variety of factors may be considered by the trier of fact. Dickey, 736 F.2d at 588. For example, evidence of the quantity of drugs moving in and out of a defendant's possession has been found to justify a

jury's conclusion that he received large income from his drug business. See United States v. Webster, 639 R.2d 174, 182 (4th Cir. 1981). See also United States v. Sisca, 503 F.2d 1337, 1346 (2d Cir. 1974) (evidence of defendant's position in the distribution network, the substantial sums of money changing hands and substantial anticipated profit was sufficient for jury to find substantial income derived from enterprise). Evidence before the jury included proof of large amounts of marijuana and the typical price per pound paid for the grades. Offloaders testified to receiving large cash payments. Others testified about the usual percent of profit made by one in Martin's role. There was ample evidence from which the jury could find that Martin derived substantial income from the enterprise. Martin's conviction of engaging in a continuing criminal enterprise must be sustained.

The district court sentenced Martin to five years' imprisonment on count 2, to run concurrently with a ten-year sentence on the

continuing criminal enterprise count. Because Congress did not intend that a person should be punished under both § 846 and § 848, Martin's sentence on count 2 must be set aside. See Jeffers v. United States, 432 U.S. 137, 156-57 (1977) (plurality opinion); Garrett v. United States, 471 U.S. 773, 794 (1985).

Contrary to Martin's assertion, the district court did not err by refusing to submit the issues of venue and variance to the jury. The conspirators procured marijuana in Jamaica, shipped it to Florida, and transported it to Virginia for distribution. Martin frequently came to Virginia to receive payment for his services in Jamaica. Although he was not told of the exact location of the stash house, he knew it was in the area. The importation was a continuous offense subject to prosecution in Virginia, and the district court correctly held that the government had proved venue as a matter of law. United States v. Massa, 686 F.2d 526, 530-31 (7th Cir. 1982).

We find no error in the court's refusal to give Martin's requested instruction that in order to find Martin guilty of the conspiracies charged in counts 1 (importation) and 2 (possession with intent to distribute) it had to find beyond a reasonable doubt that each was a single conspiracy rather than two or more separate conspiracies. The evidence disclosed a single conspiracy with respect to each count. The conspirators joined to further a common design, distribution of marijuana imported from Jamaica. Because there was no variance between indictment and proof, a multiple conspiracy instruction was unwarranted. See United States v. Towers, 775 F.2d 184, 189-90 (7th Cir. 1985).

Martin's final contention is that the court erred in admitting the testimony of Harry Stiles, an investigator with the sheriff's department in Brazera County, Texas. Stiles testified about negotiations he conducted with Martin for purchase of marijuana unrelated to any of the charges in the indictment.

Although the deal was never completed, Stiles testified, among other things, that Martin told him that he could supply marijuana and that he had Jamaican airstrips available and Jamaican police on his payroll.

Martin's statements to Stiles were clearly relevant under Fed. R. Evid. 401. The district court did not abuse its discretion in concluding that the probative value of the evidence outweighed the danger of unfair prejudice. Fed. R. Evid. 403; United States v. Ranney, 719 F.2d 1183, 1188 (1st Cir. 1983).

The parts of the judgment convicting Martin of the charges in counts 8 and 9 are vacated. The sentence imposed on count 2 is set aside. In all other respects the judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

UNITED STATES OF AMERICA

v. CRIMINAL NO. 85-00108-R

ASTILL H. JADUSINGH, SR.
aka "Sing"
WINSTON ROY MARTIN
aka "Marcus"

SUPERSEDING INDICTMENT

MARCH 1986 TERM - At Richmond

THE GRAND CHARGES THAT:

A. From in or about April, 1982, and continuing thereafter up to and including March,

1985, in the Eastern District of Virginia, and elsewhere, ASTILL H. JADUSINGH, SR., aka "Sing", and WINSTON ROY MARTIN, aka "Marcus", unlawfully and intentionally did conspire and agree together and with William R. Berger, Vincent Ray Willis aka Christopher David Hartwell, and other persons both known and unknown to the Grand Jury, to import marijuana from a place outside the United States to the Richmond, Virginia area through Florida and South Carolina, in violation of Title 21, United States Code, Section 952.

B. It was part of said conspiracy that during April and May, 1982, William R. Berger and Vincent Ray Willis travelled to Jamaica to arrange a load of marijuana.

C. It was part of said conspiracy that Berger and Willis arranged to obtain 2,000 pounds of Jamaican sinsemilla marijuana, having a street value in excess of $2,000,000.00 from a Jamaican known as Devon. While the boat that was to be used to

transport the marijuana to the United States was being loaded with 500 pounds of marijuana, uniformed Jamaican police arrived and arrested Berger, Willis and their crew.

D. It was part of said conspiracy that WINSTON ROY MARTIN arrived at the scene of the loading with a vice squad of Jamaican police. These vice squad officers ordered the uniformed officers to leave the area, and WINSTON ROY MARTIN made arrangements to otbain 1,500 additional pounds of marijuana. This additional marijuana was loaded onto the boat by Berger, Willis, WINSTON ROY MARTIN, and the vice squad, after a bribe had been paid to the vice squad. Willis, with a crew of unknown person(s), piloted the boat back to an unknown location in the United States. The marijuana was unloaded and brought to the Richmond, Virginia area for storage and distribution.

E. It was part of said conspiracy that during August, 1982, Berger, Willis, Steven G. Wickman, and James R. Smith travelled to Jamaica to import another load of marijuana.

F. It was part of said conspiracy that during August, 1982, a boat named the "Test Boat One", being operated by Wickman and Smith, was loaded with approximately 1,200 pounds of Jamaican sinsemilla and commercial grade marijuana, having a street value in excess of $1,200,000.00, while docked at the customs dock at Port Antonio, Jamaica.

G. It was part of said conspiracy that after WINSTON ROY MARTIN paid a bribe to an official of the Jamaican customs service, that Wickman and Smith piloted the boat from Jamaica, leaving on or before August 17, 1982, to Charleston, South Carolina, arriving on or about August 21, 1982.

H. It was part of said conspiracy that the 1,200 pounds of marijuana was transported from

Charleston, South Carolina to Richmond, Virginia, where it was stored for subsequent distribution.

I. It was part of said conspiracy that ASTILL H. JADUSINGH, SR. entered the United States at Miami, Florida on August 18, 1982, and on August 25, 1982, along with Berger and Willis, inspected the marijuana at the place in Richmond, Virginia where it had been stored.

J. It was part of said conspiracy that in July, August, or September, 1982, WINSTON ROY MARTIN went to Lanexa, Virginia, and Richmond, Virginia to discuss this load of marijuana with Berger and others.

K. It was part of said conspiracy that during April, 1983, Clarence Elbourn and Elbert Larry Cheatham piloted the "Test Boat One" to Kingston, Jamaica, for the purpose of transporting another load of marijuana to the Richmond, Virginia area.

L. It was part of said conspiracy that ASTILL H. JADUSINGH, SR., and WINSTON ROY MARTIN

sold Berger and Willis approximately 1,550 pounds of Jamaican sinsemilla marijuana, having a street value in excess of $1,550,000.00.

M. It was part of said conspiracy that the 1,550 pounds of marijuana were loaded onto the "Test Boat One", as it was anchored off the shore at the property of ASTILL H. JADUSINGH, SR., by and under the direction and supervision of ASTILL H. JADUSINGH, SR., WINSTON ROY MARTIN, Berger, Willis, Elbourn, Cheatham, and numerous other Jamaican persons.

N. It was part of said conspiracy that Elbourn and Cheatham left Jamaica intending to pilot the boat to the United States. However, the boat experienced transmission trouble in Cuban waters, the boat was seized, and Elbourn and Cheatham were arrested by the Cuban authorities.

O. It was part of said conspiracy that during June and July, 1983, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN sold Berger and Willis

approximately 1,200 pounds of Jamaican sinsemilla marijuana, having a street value in excess of $1,200,000.00. This marijuana was transported from Jamaica to West Palm Beach, Florida aboard a boat named the "Corobia II", which was owned and operated by Rudolph Noe.

P. It was part of said conspiracy that the 1,200 pounds of marijuana were transported from West Palm Beach, to Gum Tree, Virginia where it was stored for subsequent distribution.

Q. It was part of said conspiracy that during July, 1983, ASTILL H. JADUSINGH, SR. travelled to Richmond, Virginia to inspect the load of marijuana and to collect money owed to him for the marijuana.

R. It was part of said conspiracy that during August, 1983, WINSTON ROY MARTIN travelled to Richmond, Virginia to collect money owed to him for the marijuana.

S. It was part of said conspiracy that during November and December, 1983, Willis arranged for Wickman to take Wickman's boat, "The Magnet", to Jamaica to transport another load of marijuana.

T. It was part of said conspiracy that during December, 1983, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN sold Berger and Willis approximately 800 pounds of Jamaican sinsemilla marijuana, having a street value in excess of $800,000.00, which was loaded onto "The Magnet" as it was anchored off the coast of the property of ASTILL H. JADUSINGH, SR. by and under the direction of ASTILL H. JADUSINGH, SR., WINSTON ROY MARTIN, Willis, Wickman, Smith, and numerous other persons.

U. It was part of said conspiracy that the marijuana was taken by Wickman and others to West Palm Beach, Florida, where it was given to Willis.

Smith then took the marijuana to the Richmond, Virginia area to be stored for subsequent distribution.

V. It was part of said conspiracy that in December, 1983, ASTILL H. JADUSINGH, SR. travelled to Richmond, Virginia to discuss this load of marijuana with Berger.

W. It was part of said conspiracy that during October and November, 1984, ASTILL H. JADUSINGH, SR. loaded approximately 200 pounds of Jamaican sinsemilla marijuana onto Wickman's boat, "The Magnet", as it was anchored off the shore of JADUSINGH's property. Wickman agreed to take the marijuana to Flordia, and to call a number which ASTILL H. JADUSINGH, SR. gave him when he reached Florida. Wickman eventually took the marijuana to Las Vegas, Nevada.

X. It was part of said conspiracy that in approximately March, 1985, ASTILL H. JADUSINGH,

SR. travelled to Las Vegas, Nevada, in an effort to collect the money owed to him by Wickman for the marijuana.

(In violation of Title 21, United States Code, Section 963.)

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

A. From in or about April, 1982, and continuing thereafter up to and including March, 1985, in the Eastern District of Virginia, and elsewhere, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN unlawfully and intentionally did conspire and agree together and with William R. Berger, Vincent R. Willis aka Christopher David Hartwell, and other persons both known and unknown to the Grand Jury, to possess with intent to distribute in the Richmond, Virginia area in excess of 1,000 pounds of marijuana, in violation of Title 21, United States Code, Section 841.

B. The allegations of paragraphs B through X of Count One above are incorporated herein by reference.

(In violation of Title 21, United States Code, Section 846.)

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

A. From in or about April, 1982, and continuing thereafter up to and including March, 1985, in the Eastern District of Virginia, and elsewhere, Defendant WINSTON ROY MARTIN did unlawfully, knowingly and intentionally engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 841, 843, 846, 952 and 963, which violations, including but not limited to those set forth in Counts Four through Eleven of this Indictment, were part of a continuing series of violations of said statutes undertaken by WINSTON ROY MARTIN in concert with at least five

other persons, with respect to whom WINSTON ROY MARTIN occupied a position of organizer, supervisor or other position of management, and from which continuing series of violations WINSTON ROY MARTIN obtained substantial income and resources.

B. From his engagement in the aforesaid Continuing Criminal Enterprise WINSTON ROY MARTIN obtained property, profits and interests which are subject to forfeiture by the United States, including but not limited to, Martin Shell Service Station, Martin's Transport, and Martin's Car Rental. (In violation of Title 21, United States Code, Section 848.)

COUNT FOUR

THE GRAND JURY FURTHER CHARGES that during April and May, 1982, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN did import into the Eastern District of Virginia, from a place outside of

the United States approximately 2,000 pounds of marijuana, a Schedule I Controlled Substance.

(In violation of Title 21, United States Code, Sections 952(a) and 960(b)(2) and Title 18, United States Code, Section 2.)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES that during April and May, 1982, in the Eastern District of Virginia, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN possessed with intent to distribute approximately 2,000 pounds of marijuana, a Schedule I controlled substance.

(In violation of Title 21, United States Code, Sections 841(a)(1) and (b)(6) and Title 18, United States Code, Section 2.)

COUNT SIX

THE GRAND JURY FURTHER CHARGES that during August, 1982, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN did import into the Eastern

District of Virginia, through the District of South Carolina, from a place outside of the United States, approximately 1,200 pounds of marijuana, a Schedule I controlled substance.

(In violation of Title 21, United States Code, Sections 952(a) and 960(b)(2) and Title 18, United States Code, Section 2.)

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES that during August, 1982, in the Eastern District of Virginia, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN possessed with intent to distribute approximately 1,200 pounds of marijuana, a Schedule I Controlled Substance.

(In violation of Title 21, United States Code, Sections 841(a)(1) and (b)(6) and Title 18, United States Code, Section 2.)

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES that during July, 1983, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN did import into the Eastern District of Virginia through the Southern District of Florida from a place outside of the United States, approximately 1,200 pounds of marijuana, a Schedule I Controlled Substance.

(In violation of Title 21, United States Code, Sections 952(a) and 960(b)(2) and Title 18, United States Code, Section 2.)

COUNT NINE

THE GRAND JURY FURTHER CHARGES that during July, 1983, in the Eastern District of Virginia, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN possessed with intent to distribute approximately 1,200 pounds of marijuana, a Schedule I Controlled Substance.

(In violation of Title 21, United States Code, Sections 841(a)(1) and (b)(5) , and Title 12, United States Code, Section 2.)

COUNT TEN

THE GRAND JURY FURTHER CHARGES that during December, 1983, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN did import into the Eastern District of Virginia through the Southern District of Florida from a place outside of the United States, approximately 800 pounds of marijuana, a Schedule I Controlled Substance.

(In violation of Title 21, United States Code, Sections 952(a) and 960(b)(2) and Title 18, United States Code, Section 2.)

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES that during December, 1983, in the Eastern District of Virginia, ASTILL H. JADUSINGH, SR. and WINSTON ROY MARTIN possessed with intent to distribute

approximately 800 pounds of marijuana, a Schedule I Controlled Substance.

(In violation of Title 21, United States Code, Sections 841(a)(1) and (b)(6) and Title 18, United States Code, Section 2.)